

ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:

Petition for Closed Captioning Exemption et al.

) CGB-CC-0949

) CG Docket No. 06-181

La Santa Misa ("Sunday Mass") of the

)

San Fernando Cathedral of San Antonio (TX)

)

To: Secretary

Accepted/Filed

MAR 13 2014

FCC Office of the Secretary

APPLICATION FOR REVIEW

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March 13, 2014

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APPLICATION FOR REVIEW

The San Fernando Cathedral of San Antonio, TX (“SFC” or “Church”), pursuant to 47 CFR §§ 1.115 and 1.4(b)(5), submits this Application for Review of the Letter, dated February 11, 2014 (“2014 Letter”), whereby the FCC’s Consumer and Governmental Affairs Bureau (“Bureau”) purported to dismiss, as “incomplete,” SFC’s Petition for Exemption and/or Waiver, filed on December 24, 2009 (hereinafter “Petition”), which broadly requests relief on multiple bases from the FCC’s closed captioning rules and policies for the SFC’s liturgical, historic “*La Santa Misa*” telecast (“Sunday Mass”).¹ The Petition bases SFC’s entitlement to administrative relief on both constitutional and also statutory/regulatory grounds.

Background

On April 5, 2012, the Bureau mailed a letter to SFC (“2012 Letter”), requiring that SFC respond by July 5, 2012, either (i) “affirming the accuracy of the information” in its 2009 Petition or (ii) by “supplementing” the Petition’s “information,” in order for the Bureau to determine whether the SFC’s Sunday Mass “should be exempted” from FCC closed captioning rules. The Bureau’s 2012 Letter focused exclusively on the sole issue of whether the Petition contained “accurate documentation to support a claim that providing closed captioning would be *economically burdensome*” to SFC.² The 2012 Letter failed even to acknowledge the Petition’s argument that the Sunday Mass telecast qualifies under the FCC’s rules for a “categorical [automatic] exemption.”

In response to the Bureau’s 2012 Letter, SFC filed a “Supplement to Petition for Exemption and/or Waiver” on July 5, 2012 (“2012 Supplement”). SFC provided, as requested, substantial additional information regarding the multiple evidentiary bases on which SFC is entitled to (i) a *categorical* [automatic] exemption, and/or (ii) an *individual* exemption [under the FCC’s separate “undue burden” rules] and/or (iii) a *waiver* [for “good cause” shown, in the public interest]. Additionally, however, the

¹ See Petition, at 2 and 2012 Supplement at note 1 and Appendix A.

² Among five (5) evidentiary factors listed by the Bureau in its 2012 Letter, one concerned “information...[about] the impact that providing captions would have on your programming...” *Id.*, at 2.

2012 Supplement also noted that a recent decision of the U.S. Supreme Court³ raises a threshold *constitutional* issue in this proceeding: namely, that any FCC-mandated captioning of the liturgical Sunday Mass telecast, *inter alia*, would violate SFC's First Amendment rights. *Id.* at 1-2. The 2012 Supplement also noted that such an intrusive mandate into the Church's right to determine the visual format of this historic liturgical observance would, in fact, force SFC to cancel the Sunday Mass, which is telecast weekly in Spanish to an available audience of millions. *Id.*

On November 5, 2013, the Bureau mailed yet another Letter to SFC ("2013 Letter"), which tersely, summarily and without a reasoned basis rejected SFC's *constitutional* argument, *ignored* the Petitioner's argument that the Sunday Mass is, alternatively, entitled to a *categorical* exemption, *ignored* the Petitioner's argument that, alternatively, it also is entitled to a *waiver* of the FCC's rules, and merely requested Petitioner to respond with additional supplemental information on the sole issue of the Sunday Mass's entitlement to an *individual* exemption under the FCC's "undue burden" rules. On December 4, 2013, SFC filed yet another "Response and Further Supplement to Petition" ("2013 Supplement"), in which SFC provided substantial supplemental information on the threshold *constitutional* issue and the exemption/waiver issues.

On February 11, 2014, the Bureau issued a Letter Decision dismissing SFC's 2009 Petition. The Bureau's dismissal of the Petition was silent as to the *constitutional* issue, the *categorical* exemption issue and the *waiver* issue.

Questions for Review

1. Whether the Bureau's cursory dismissal of the Petition, on procedural grounds and as to only one of the four issues raised by Petitioner, provided a reasoned, legally sustainable basis under relevant statutory and regulatory precedent.

³ See *Hosanna-Tabor Evangelical Church v. EEOC*, 132 S. Ct. 694 (2012).

2. Whether the FCC has the authority, under the First Amendment, to mandate closed-captioning of the Sunday Mass telecast, where the record establishes that such an intrusive federal mandate--regarding the visual format of the SFC's historic religious observance--would violate SFC's religious rights to make such sensitive internal judgments based on liturgical strictures of the Catholic Church and the specific dictates of the U.S. Catholic Conference of Bishops.

3. Whether the Bureau's summary dismissal of the Petition, without any discussion of the Petition's claim--that the Sunday Mass telecast, alternatively, is entitled under FCC rules to a *categorical* [automatic] exemption--is arbitrary, capricious or otherwise unlawful.

4. Whether the Bureau provided a reasoned basis under the evidence and applicable legal precedent for its summary conclusion that SFC is not entitled, alternatively, to an *individual* exemption where SFC's evidence establishes that a closed-captioning mandate for the Sunday Mass telecast would result not merely in an "undue burden" but also because SFC's "crippling" financial difficulties would force SFC's cancellation of the Sunday Mass telecast.

5. Whether the Bureau's failure even to address, much less to decide, the Petition's alternative request for a "waiver," under the FCC's broad "public interest" criteria, constitutes reversible error.

Factors Warranting Commission Review

Under Section 1.115 of the FCC's rules, the following factors warrant the agency's review of the cursory "dismissal" of SFC's Petition:

1. The Bureau's action taken pursuant to delegated authority is unconstitutional.
2. The Bureau's action taken pursuant to delegated authority involves questions of law that have not been previously resolved by the Commission.
3. The Bureau's action taken pursuant to delegated authority is inconsistent with both the FCC's rules and legal precedent, whereby questions of fact and law are deemed to be legally decided only where the FCC has considered and reasonably addressed all relevant factors.

ARGUMENT

I. THE BUREAU ERRED IN SUMMARILY REJECTING PETITIONER'S CONSTITUTIONAL ARGUMENT WITHOUT ANY REASONED ANALYSIS OR SUSTAINABLE LEGAL BASIS.

The SFC relies upon several independent bases in seeking administrative relief from FCC-mandated closed captioning of its Sunday Mass. Petitioner's principal argument is that an FCC requirement to alter the visual format of its liturgical Sunday Mass telecast by mandating closed captioning would violate SFC's First Amendment rights as well as the constitutionally protected "free exercise rights" of more than one million viewers for whom the Sunday Mass is available each week. See, e.g., 2012 Supplement, at 1-2 and Appendix A.

The 2014 Letter dismissed the Petition on procedural grounds was conspicuously and unlawfully silent as to SFC's *constitutional* issue. The Bureau's 2013 Letter lacked any reasoned analysis of that threshold issue, stating that the Petition's reliance on the Supreme Court's decision in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, supra, is "not pertinent" as to whether an FCC closed-captioning mandate would violate Petitioner's religious rights. See 2013 Letter, at 1. The Bureau's only proffered explanation was that a closed-captioning mandate for the Sunday Mass does "not interfere with any religious organization's selection of ministers." Id., emphasis added.

The Bureau's cursory and curious analysis of SFC's *constitutional* issue is not legally sustainable. As the Chief Justice made clear, the legal principle undergirding the Supreme Court's recent decision in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, supra, is that federal rules may not constitutionally interfere with a religious organization's discretion to make sensitive internal judgments. Id. SFC's evidence explained with detailed specificity how the FCC's mandating a *major alteration* in the visual format of the Sunday Mass telecast would ipso facto constitute an unlawful intrusion into the internal decision-making and longstanding religious directives of SFC regarding the sacred Sunday Mass--an "established liturgy" established by the Catholic Church for millennia. See 2012 Supplement at Appendix A and 2013 Supplement at 4, note 11 and Appendix A.

SFC's evidence established that the Sunday Mass long has been subject to the "strict requirements" of the Church's core liturgical guidelines." Id. Indeed, the Sunday Mass is one of the most sacred religious observances of Catholic liturgy. Id. The evidence established that closed captioning (or even 'signing') presents a huge, threshold problem" because Catholic traditions require that the visual presentation of the Sunday Mass cannot be altered or distorted. Id. Moreover, SFC's evidence further established that a "distortion" such as closed captioning is strictly prohibited by the "specific guidelines" of the U.S. Catholic Conference of Bishops." Id. Furthermore, SFC explained that the Church's sensitive, internal judgment is such that closed captioning would so alter the visual format of the Sunday Mass as to "denigrate" its historic solemnity; thus, the evidence established that such an FCC mandate would leave SFC with no choice but to cancel the Sunday Mass. Id. Thus, Petitioner detailed precisely how closed captioning of this sacred religious observance unlawfully would substitute a temporal federal judgment for the sensitive, internal and "solemn judgment" of the Catholic Church. Id.⁴

Notwithstanding SFC's substantial evidence as to the dire consequences that such an intrusive federal rule would have if applied to the sacred Sunday Mass telecast, the Bureau's 2014 Letter was unlawfully silent on this threshold *constitutional* issue and unlawfully even failed to discuss, much less to distinguish, the 2013 Supplement's citations to other cases where the Supreme Court held that certain federal rules could not be imposed on religious organizations and also where the First Amendment shielded religious organizations against certain federal regulations. Id., at 4 and note 11.⁵

In sum, the Bureau unlawfully substituted its governmental judgment for SFC's sensitive internal judgment as to the visual format of the liturgical Sunday Mass. Cf. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, supra (federal rules may not constitutionally

⁴ Petitioner also noted that federal appellate Courts repeatedly have held that the rights of religious groups extend to "religiously motivated conduct," such as the Sunday Mass. See 2013 Supplement, at 3 and note 11. Accord The Origins and Historical Understanding of Free Exercise of Religion, 103 Harvard L. Rev. 1409, 1488-89.

⁵ See Public Media Center v. FCC, 587 F.2d 1322, 1331 (D.C. Cir. 1978) (FCC must clearly and fully articulate its basis for any decision and engage in reasoned decision-making). The 2014 Letter also ignored the Petition's citation to former FCC Commissioner Mc Dowell's stated "concern" in 2012 that a closed-captioning mandate might in some cases be "harmful." See 2012 Supplement at note 9.

interfere with a religious organization's discretion to make sensitive internal judgments). The Bureau's only discussion of this threshold issue failed to provide a reasoned explanation of why the Supreme Court's protection of a Church's religious right to determine its own internal *employment* policies is not logically applicable to the even more sensitive issue of SFC's right solely to make solemn, internal judgments concerning the visual format of this historic, weekly religious observance. Indeed, SFC established that federally-mandated closed captioning of the Sunday Mass telecast not only would be so visually disruptive as to violate fundamental Catholic orthodoxy, format and procedures but also would violate specific guidelines of the 2011 U.S. Catholic Conference of Bishops, which prohibit any denigration of the solemnity of the liturgical Sunday Mass. Cf. Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998)(Court holds aspects of the FCC's EEO rules unconstitutional); see Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013).⁶

II. THE BUREAU'S DISMISSAL OF THE PETITION ON EVIDENTIARY GROUNDS IS ARBITRARY, CAPRICIOUS AND UNLAWFUL

The Bureau's 2014 Letter unlawfully concluded that SFC's 2009 Petition should be dismissed on the sole legal basis that, even as supplemented, its evidence was "incomplete." The Bureau's conclusion was both factually and legally erroneous.

1. The Bureau's failure to even acknowledge or discuss the Petition's initial evidentiary contention constitutes reversible error.

The Bureau's 2014 dismissal of the Petition is based solely on the erroneous contention that SFC's evidentiary record was "incomplete" as to four recently-denominated evidentiary items: (a) documentation of SFC's "financial status," (b) information as to the "costs" of closed captioning, (c) "verification" that assistance was sought from the telecast's "distributor" and (d) "verification" that SFC

⁶ See Church of Lukumi Babalu Awe, Inc. v. City of Hialeah, 508 U.S. 520, 525 (1993); Little Sisters of the Poor et al. v. Sebelius Order, January 24, 2014 (Supreme Court stays, pending appeal, any enforcement of federal rule requiring Catholic group to provide contraceptives to its employees).

sought “other sources of revenue for captioning.” *Id.*, at 1. It is noteworthy that the Bureau’s four “evidentiary items” are not the evidentiary factors stated in the FCC’s rules as governing the resolution of petitions for exemptions. *See* 47 CFR § 79.1(d) and (f). In any event, it should be controlling here that the Petition met the evidentiary factors that are expressly stated in the FCC’s rules.⁷

The 2014 Letter, dismissing the Petition, fixated erroneously on only the 2013 Letter’s recently articulated four “evidentiary items,”⁸ which addressed merely SFC’s entitlement to an *individual* exemption, based on evidence of “undue burden.”⁹ Thus, the Bureau’s sole legal basis for dismissing the Petition was its contention merely that the Petition’s evidence on the “undue burden” issue was “incomplete.” Hence, the Bureau failed *even to discuss*, much less to reasonably adjudicate, Petitioner’s claim of its prima facie entitlement to a “*categorical* exemption” pursuant to 47 CFR 79.1(d)(8), for which no evidence as to the Bureau’s four, new “evidentiary items” was required to be adduced.¹⁰

Petitioner met the requirements of Section 79.1(d)(8) for its entitlement to a “*categorical* exemption” with uncontested evidence that the Sunday Mass telecast is a locally produced, non-news program, of local religious and social interest, which has no repeat value.¹¹ Neither the Bureau’s 2012 Letter, its 2013 Letter, nor its 2014 Letter (dismissing the Petition) even acknowledged this independent evidentiary basis for Petitioner’s [automatic] entitlement to an exemption from the FCC’s closed-captioning rules. The Bureau’s refusal even to acknowledge the Petition’s unrefuted evidence, establishing that the Sunday Mass telecast is entitled to a *categorical* exemption, is a **stunningly egregious** legal error. *See Public Media Center v. FCC, supra*. Indeed, the Bureau’s repeated and arguably cavalier refusal even to address all four of the Petition’s independent bases for relief from the

⁷ *See* Petition at 3-5 & Appendix B; 2012 Supplement at 2-7 & Appendix A; and 2013 Supplement at Appendix A.

⁸ In its 2012 Letter, the Bureau confusingly specified five evidentiary “items” to be addressed, not four items.

⁹ *See* 47 CFR § 79.1(f) (1).

¹⁰ *See* Petition at 2-3 and 2012 Supplement at 3 & Appendix A.

¹¹ *Id.*

closed-captioning rules is demonstrably contrary to the documented, repeated intent of Congress and the FCC that the closed-captioning rules avoid “harm” to local programming producers.¹²

2. **The Bureau’s dismissal of the Petition, on grounds that SFC’s evidence of “undue burden” was “incomplete,” is arbitrary, capricious and unlawful.**

The 2014 Letter’s conclusion that Petitioner’s evidence on the alternative “undue burden” issue was “incomplete” is, *inter alia*, *factually* erroneous.

First, the 2014 Letter, dismissing the Petition, failed to meet even minimal standards of reasoned agency decision-making.¹³ Even assuming *arguendo* that SFC’s evidence failed to meet the Bureau’s four “evidentiary items,”¹⁴ the 2014 Letter failed to articulate any reasoned basis *why* Petitioner’s substantial evidence failed to establish that closed captioning would produce an “undue burden” on SFC. Because the Bureau unlawfully failed to reasonably articulate *why* Petitioner’s allegedly “incomplete” record-- based *only* on the Bureau’s four new evidentiary “items”-- was legally adequate grounds for the Bureau’s summary dismissal of the Petition, the Bureau’s action constitutes reversible error.¹⁵

Moreover, the 2014’s Letter’s contention that SFC’s evidence was “incomplete” with respect to the Bureau’s four new evidentiary “items” is patently incorrect . For example, as to the first of these four items, the record contains substantial evidence of the SFC’s “financial status.”¹⁶ With respect to the second item, there is substantial evidence as to the “costs associated with captioning” the Sunday Mass.¹⁷ Likewise, with respect to the third item, the record contains substantial evidence verifying that the SFC’s satellite distributor is unwilling to provide any assistance to SFC with regard to closed

¹² See, e.g., *Closed Captioning Report and Order*, 13 FCC Rcd 3272, 3364-5 and ¶ 202 (1997).

¹³ See *Public Media Center v. FCC*, *supra* (FCC must fully articulate its reasoned basis for any decision).

¹⁴ But see *Discussion, infra*, as to why even this generous “assumption” is not correct. See also note 8, *supra*.

¹⁵ See *Public Media Center v. FCC*, *supra*.

¹⁶ See Petition at 3-6 & Appendix B (detailed SFC financial information); 2012 Supplement at 4-7 & Appendix A; 2013 Supplement at Appendix A (evidence as to substantial SFC deficits, such that closed-captioning would be “crippling” and require the SFC to terminate the Sunday Mass telecast).

¹⁷ *Id.*

captioning of the Sunday Mass.¹⁸ Finally, the record contains substantial evidence verifying that there are no “other sources of revenue for captioning.”¹⁹ Thus, the record as a whole confirms that SFC adduced substantial evidence, inter alia, to meet the Bureau-denominated, four new evidentiary “items.”

Furthermore, Petitioner’s evidence unambiguously established that if the FCC mandated closed captioning of the Sunday Mass telecast, then SFC would have no choice but to terminate the weekly telecast of this historic, liturgical religious observance.²⁰ In such circumstances, there can be no debate. Any FCC-imposed closed-captioning “burden” that would result in the shutdown of the very program for which an exemption is sought, should legally be judged to be, inter alia, an “undue” burden.²¹ In sum, the Bureau’s dismissal of the Petition, on grounds that SFC’s evidence of “undue burden” was “incomplete,” constitutes reversible error. See Public Media Center v. FCC, supra.

3. The Bureau failed to discuss Petitioner’s alternative request for a Waiver

The 2014 Letter was also unlawfully mute regarding Petitioner’s alternate evidentiary argument that, beyond the two regulatory “exemption” factors listed in Sections 79.1(d) (8) and (f) of the FCC rules, SFC is entitled to “waiver” of the closed captioning rules under the FCC’s “good cause” standard²² and also pursuant to 47 USC § 154(j), which requires the FCC to determine *in every proceeding* wherein the “public interest” lies. See Petition at 5 and 2012 Supplement at 7-8.²³ For example, the Petition noted that a forced shutdown of the Sunday Mass telecast, resulting from an FCC closed-captioning mandate, would violate other FCC rules and policies designed to promote ‘locally

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ See 2013 Supplement, at Appendix A.

²² See generally WAIT Radio v. FCC, 418 F. 2d 1153 (D.C. Cir. 1969).

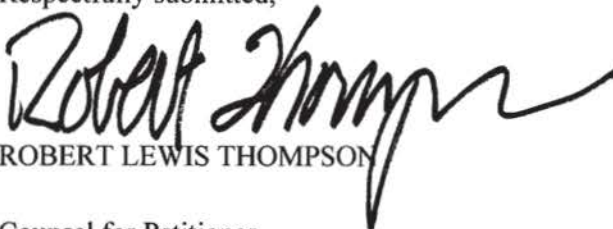
²³ Indeed, the Petition is conspicuously entitled “Petition for Exemption and/or Waiver,” emphasis added.

produced programming.” Id. The Bureau’s failure even to acknowledge and reasonably discuss this independent, alternative basis for relief is also reversible error. See Public Media Center v. FCC, supra.

CONCLUSION

In view of the foregoing, the Bureau’s dismissal of the Petition should be reversed, set aside and the Commission promptly should grant appropriate administrative relief to Petitioner.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert Thompson", with a stylized flourish extending to the right.

ROBERT LEWIS THOMPSON

Counsel for Petitioner

March 13, 2014